82-1219

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HERBERT CLYDE SQUIRES
Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Carlos M. Recio
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777

Attorney for Petitioner
Herbert Clyde Squires

QUESTIONS PRESENTED

1. Whether a United States Court of Appeals has the power to *sua sponte* affirm an administrative order of deportation upon novel grounds not relied upon or even considered by the administrative agency — The Board of Immigration Appeals — in ordering deportation.

2. Whether the Court of Appeals erred in applying the relation-back doctrine rejected by this Court in *Costello v. INS*, 376 U.S. 120 (1963) to uphold petitioner's deportation order.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
DECISIONS BELOW 1
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 5

I. THE COURT OF APPEALS ERRED IN *SUA SPONTE* AFFIRMING PETITIONER'S DEPORTATION ON A NOVEL GROUND NOT RELIED UPON OR PRESENTED TO THE BOARD OF IMMIGRATION APPEALS 6

II. THE COURT OF APPEALS ERRED IN APPLYING THE RELATION-BACK DOCTRINE REJECTED BY THIS COURT IN *COSTELLO* V. *INS*, 376 U.S. 120 (1963) TO UPHOLD PETITIONER'S DEPORTATION, ESPECIALLY WHERE APPLICATION OF THAT DOCTRINE LEADS, IN THE COURT OF APPEALS' WORDS, TO "HARSH" AND "ANOMALOUS" RESULTS 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES CITED	PAGE
Barber v. Gonzales, 347 U.S. 637 (1954)	9
Burlington Truck Lines v. United States, 371 U.S. 156 (1962)	6
Costello v. INS, 376 U.S. 120 (1963)	6, 8, 9
FPC v. Texaco, Inc., 417 U.S. 380 (1974)	6
Fong Haw Tan v. Phelan, 333 U.S. 6 (1948)	9
Francis v. INS, 532 F.2d 268 (2d Cir. 1976)	8
Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962)	3
INS v. Errico, 385 U.S. 214 (1966)	8
INS v. Miranda, 51 J.S.L.W. 3358 (S. Ct. Nov. 9, 1982)	7
INS v. Wang, 450 U.S. 139 (1981)	6, 7, 8
Industrial Union Dept. AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980)	6, 8
Matter of Silva, 16 I & N Dec. 26 (BIA 1976)	9
Matter of T-, 6 I & N Dec. 508 (Atty. Gen. 1955)	3

Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), *cert. granted*, 51 U.S.L.W. 3329 (S. Ct. Nov. 2, 1982) 6

Rosenberg v. Fleuti, 374 U.S. 449 (1963) 10

Securities and Exchange Comm. v. Chenery Corp., 332 U.S. 194 (1947) 6

Singleton v. Wulff, 428 U.S. 106 (1976) 7

Soetarto v. INS, 516 F.2d 778 (7th Cir. 1975) 3

Squires v. INS, 689 F.2d 1276 (6th Cir. 1982) *passim*

Tapia-Acuna v. INS, 449 U.S. 945 (1980) 9

Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981) 9

Udall v. Tallman, 380 U.S. 1 (1965) 7

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) 7

Woodby v. INS, 385 U.S. 276 (1966) 9

STATUTES

8 U.S.C. § 1105(1) 3
8 U.S.C. § 1182(a) (9) 2, 3
8 U.S.C. § 1182(c) 8
8 U.S.C. § 1251(a) (1) 2, 3, 10, 11
8 U.S.C. § 1251(d) 10
28 U.S.C. § 1254(1) 2
22 D.C. Code § 1410 ..... 4, 5

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DECISIONS BELOW

The opinion of the Court of Appeals, *Squires v. INS*, 689 F.2d 1276 (6th Cir. 1982), is appended hereto, (Pet. App. A, pp. APP-1 to APP-19, *infra*). Also appended is the decision of the Board of Immigration Appeals in this case, *Matter of Squires*, ____I & N Dec.____ (B.I.A. Interim Dec. #2833 1980) (Pet. App. C, pp. APP-22 to APP-26, *infra*) and the unreported decision of the Immigration Judge (Pet. App. D, pp. APP-27 to APP-32, *infra*).

JURISDICTION

The opinion of the Court of Appeals was filed on October 7, 1982. A timely petition for rehearing was denied on December 21, 1982 (Pet. App. B, pp. APP-20 to APP-21, *infra*). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

8 U.S.C. § 1251(a) (1)provides:

> Any alien in the United States. . .shall, upon the order of the Attorney General, be deported who:
>
> > (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

8 U.S.C. § 1182(a) (9) provides:

> [T]he following classes of aliens shall be ineligible to receive visas and shall be excludable from admission into the United States:
>
> > (9) Aliens who have been convicted of a crime involving moral turpitude. . .[except that] [a]ny alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of § 1(3) of Title 18 [U.S.C.] by reason of the punishment actually imposed,. . .may be granted a visa and admitted to the United States.

STATEMENT OF THE CASE

Petitioner Herbert Clyde Squires was convicted over twelve years ago of violating § 304(1a) of the Criminal Code of Canada. The Court of Appeals described petitioner's conviction as "little more than a routine bad check violation." Pet. App. A at p. APP-10. The Immigration Judge and the Board of Immigration Appeals found that this conviction made petitioner Squires deportable under 8 U.S.C. §§ 1251(a) and 1182(a) (9) and that the petitioner was not saved from deportation by the petty offense exception of 8 U.S.C. § 1182(a) (9) which precludes deportation of one who has been convicted of a petty misdemeanor.[1]

Petitioner Squires' deportability depends upon how one classifies his Canadian conviction. If it is classified as a felony, he is deportable. If it is classified as a misdemeanor, he is not deportable. The Immigration Judge and the Board of Immigration Appeals applied established law under which one determines whether a foreign crime is a felony or a misdemeanor under United States standards — that is, by examining analogous provisions of the United States Code or of the District of Columbia Code[2]

The Immigration Judge and the Board of Immigration Appeals held that petitioner's crime should be classified as a felony and not a misdemeanor. Accordingly, they concluded that the petty offense exception did not save him from deportation.

On petition for review pursuant to 8 U.S.C. § 1105(a), the Court of Appeals affirmed the order of depor-

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[1] These statutes are reproduced, in relevant part, at p. 2 of this petition.

[2] This procedure is well established and is not in question here. *See*, e.g., *Soetarto v. INS*, 516 F.2d 778, 780-81 (7th Cir. 1975); *Giammario v. Hurney*, 311 F.2d 285 (3d Cir. 1962); *Matter of T-*, 6 I & N Dec. 508, 517 (Atty. Gen. 1955).

tation, but on novel grounds that were not considered by the Board of Immigration Appeals or by the Immigration Judge. In fact, the Court of Appeals expressly disagreed with the reasoning of both the Immigration Judge and the Board of Immigration Appeals.

The immigration judge and the Board had analogized petitioner Squires' Canadian offense to the District of Columbia offense of "false pretenses" — which was indisputably a felony. The Court of Appeals rejected this analogy. The Court of Appeals, instead, analogized petitioner Squires' Canadian offense to the District of Columbia's "bad check" statute, 22 D.C. Code § 1410.

The Court then addressed the issue whether the D.C. Code's bad check statute defined a misdemeanor or a felony. Here, the Court of Appeals encountered a novel and important issue of immigration law.

At the time of petitioner Squires' conviction in Canada on August 11, 1970, 22 D.C. Code § 1410 defined a misdemeanor.[3] The problem was that this statute was amended on October 22, 1970 to define a felony.[4]

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[3] In August of 1970, 22 D.C. Code § 1410 provided:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both.

[4] On October 22, 1970, 22 D.C. Code § 1410 was amended to read:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, order, or other instrument for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or

The Court of Appeals reached out to decide, *sua sponte*, that petitioner Squires' Canadian conviction should be analogized to D.C. law at the time petitioner entered the United States (July 1979) rather than at the time that petitioner committed the offense (August 1970).

The Court of Appeals thus ruled that an alien's excludability on the basis of a criminal conviction must be judged at the time he enters the United States and not at the time tha alien was convicted. Put another way, the Court of Appeals adopted a relation-back theory under which 22 D.C. Code § 1410 as it existed in July of 1979 (when petitioner entered the United States) would relate back to August of 1970 (when petitioner was convicted in Canada).

The Court of Appeals characterized its decision as "harsh" and "anomalous" (Pet. App. A at pp. APP-14-15) since under its relation-back theory, an alien's deportability depends upon the accident of *when* an alien entered the United States. Had petitioner Squires entered the United States before the October 22, 1970 change in the D.C. Code, he would not now be deportable. The Court of Appeals' decision thus establishes varying standards for the excludability and deportability of identically situated aliens who happened to enter the United States at different times.

REASONS FOR GRANTING THE WRIT

The Court of Appeals correctly rejected the reasoning of both the Board of Immigration Appeals and the Immi-

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Footnote 4 (continued)

other depository for the payment of such check, draft, order, or other instrument in full upon its presentation, shall, if the amount of such check, draft, order, or other instrument is $100 or more, be guilty of a felony and fined not more than $3,000 or imprisoned for not less than 1 year nor more than 3 years, or both...

gration Judge. However, the Court then reached out, *sua sponte*, to address the novel "relation back" issue which had not been considered at the administrative level. This was error. The Court should have remanded this case back to the Board of Immigration Appeals so that it could consider the "relation back" doctrine in the first instance.

On the merits, the Court of Appeals also erred. Its harsh and anomalous decision forever banishes the petitioner from the United States and establishes arbitrary distinctions between similarly situated aliens. The Court of Appeals' relation-back doctrine is contrary to *Costello v. INS*, 376 U.S. 120 (1963) and the long established rule that immigration statutes must be strictly construed in favor of the alien.

I. THE COURT OF APPEALS ERRED IN *SUA SPONTE* AFFIRMING PETITIONER'S DEPORTATION ON A NOVEL GROUND NOT RELIED UPON OR PRESENTED TO THE BOARD OF IMMIGRATION APPEALS

The Court of Appeals violated the well-established rule that "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974), *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962). Accord, e.g., *Industrial Union Dept. AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 631 n.31 (1980); *Securities and Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Phinpathya v. INS*, 673 F.2d 1013, 1020 (9th Cir. 1981) (citing cases), *cert. granted*, 51 U.S.L.W. 3329 (S. Ct. Nov. 2, 1982).

The decision of the Court of Appeals is directly contrary to *INS v. Wang*, 450 U.S. 139 (1981). In that case, the Board of Immigration Appeals ruled that petitioners had not made a sufficient showing of "extreme hardship" to warrant the reopening of their deportation proceedings.

The *en banc* Court of Appeals concluded that the petitioners had made a *prima facie* showing of extreme hardship and reversed the Board of Immigration Appeals. This Court summarily reversed the Ninth Circuit, stating:

> [T]he Court of Appeals improvidently encroached on the authority which the Act confers on the Attorney General and his delegates. The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. *But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.*

450 U.S. at 144 (Emphasis added). The Court of Appeals has acted contrary to *INS v. Wang* by failing to permit the Board of Immigration Appeals to consider the novel "relation back" issue in the first instance.

The Court of Appeals' reaching out to decide the novel and important "relation back" issue violates basic considerations of comity in appellate decisionmaking, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) and the rule of deference to administrative decisionmaking. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). *See also*, *INS v. Miranda*, 51 U.S.L.W. 3358 (S. Ct. Nov. 9, 1982).

Only after the Board of Immigration Appeals establishes a uniform rule regarding the novel "relation-back" issue should judicial review take place.[5] Indeed, if the

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[5] For example, the Court of Appeals did not consider an alternative construction of the Act which would give an alien the benefit of *either* the "time of entry" or "time of conviction" rule. In other words, if an alien is guilty of a "foreign" offense and that offense was a petty misdemeanor when viewed either at the time of the alien's conviction or at the time of the alien's entry into the United States, then the alien would not be deportable. The Board of Immigration

Board rules favorably to the petitioner on the "relation-back" issue, *no* judicial review need take place.

The Court of Appeals has acted contrary to *INS v. Wang, Industrial Union Dept. AFL-CIO v. American Petroleum Institute,* and basic principals of appellate review. This action warrants review by this Court.

II. THE COURT OF APPEALS ERRED IN APPLYING THE RELATION-BACK DOCTRINE REJECTED BY THIS COURT IN *COSTELLO v. INS,* 376 U.S. 120 (1963) TO UPHOLD PETITIONER'S DEPORTATION, ESPECIALLY WHERE APPLICATION OF THAT DOCTRINE LEADS, IN THE COURT OF APPEALS' WORDS, TO "HARSH" AND "ANOMALOUS" RESULTS

The Court of Appeals has held that the deportability of an alien in petitioner's position depends on the accident of when the alien entered the United States. As the Court of Appeals stated, its decision leads to harsh and anomalous results.

The accident of *when* an alien happens to cross a border should not determine the alien's deportability. In fact, the Second Circuit Court of Appeals has held that such a construction of an immigration statute violates due process. *Francis v. INS,* 532 F.2d 268 (2d Cir. 1976). In *Francis,* the court considered an immigration statute, 8 U.S.C. § 1182(c), which made aliens eligible for certain discretionary relief from deportation if the alien could show that he departed and returned to the United States at some point after becoming deportable. Under the statute, eligibility for relief from deportation turned on whether an alien had made a trip abroad. The Second Circuit found that this statutory distinction was irrational and unconstitutional.

Footnote 5 (continued)
Appeals should be permitted to consider this alternative construction.

Under the Court of Appeals' construction of the Act, petitioner Squires is deportable only because of the date of his entry. Applying the logic of *Francis, supra*, this construction violates fundamental fairness.[6]

The decision of the Court of Appeals is contrary to *Costello v. INS*, 376 U.S. 120 (1963) and the well-established rule that because deportation is the equivalent of banishment or exile, immigration statutes must be strictly construed in favor of the alien. *Woodby v. INS*, 385 U.S. 276 (1966); *INS v. Errico*, 385 U.S. 214 (1966); *Costello v. INS, supra* at 128, *Barber v. Gonzales*, 347 U.S. 637 (1954); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

In *Costello, supra*, the Second Circuit held that an alien who committed crimes while he was a naturalized U.S. citizen became deportable on account of those crimes upon his denaturalization. This Court applied the rule of strict construction in favor of the alien and reversed. This Court held that the Immigration and Nationality Act's deportation provisions did not relate back to encompass crimes committed by the alien while he was a naturalized citizen.

In this case, of course, the Court of Appeals has held that the law existing at the time of an alien's entry *does* relate back to make an alien excludable from the United States even though the alien's crime would not have excluded the alien at the time he committed it.

The Court of Appeals recognized the force of *Costello*, but distinguished that decision, concluding that:

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[6] The Board of Immigration Appeals has endorsed the *Francis* decision and has elected to follow it. *Matter of Silva*, 16 I & N Dec. 26 (BIA 1976). In *Tapia-Acuna v. INS*, 449 U.S. 945 (1980), this Court granted *certiorari* and vacated and remanded a contrary Ninth Circuit case at the request of the Solicitor General. The Ninth Circuit subsequently agreed with *Francis*. *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981).

> Unlike the court in *Costello*, . . . we have explicit, albeit indirect, authority for using the relation back concept in construing the statute before us.

Pet. App. A at p. APP-16.[7]

The Court of Appeals relied solely upon the language of 8 U.S.C. § 1251(a) (1). This statute makes deportable any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." The Court of Appeals thought that this statute required that an alien's excludability be judged "by the law existing at the time of [the alien's] entry."

Section 1251(a) (1) indicates a Congressional purpose directly opposite to that found by the Court of Appeals. If the statute simply read that an alien shall be deported who "at the time of entry was within one or more of the classes of excludable aliens," then grounds of excludability enacted after an alien entered the United States would relate back to an entry that occurred years ago. However, Congress did not do this. Congress made it clear in § 1251(a) (1) that an alien is only deportable if he was excludable "by the law existing at the time of such entry." Thus, Congress did *not* want grounds of excludability to relate back.[8]

This Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449, 453 n.2 (1963) demonstrates the non-retroactivity of grounds of exclusion. There, this Court found that the alien, Mr. Fleuti, had not made an "entry" into the

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[7] The Court of Appeals' reliance on "explicit, albeit indirect" authority, by itself, contravenes the well established rule that immigration statutes must be strictly construed in favor of the alien.

[8] In contrast, Congress did provide that substantive grounds of *deportability* would relate back. 8 U.S.C. § 1251(d). Petitioner in this case is being deported because he is excludable from the United States. Substantive grounds of excludability are contained in 8 U.S.C. § 1182; substantive grounds of deportability are contained in 8 U.S.C. § 1251.

United States in 1956. Accordingly, he was not excludable as a homosexual because Congress passed the homosexual exclusion provision *after* Fleuti "entered" the United States in October 1952. Under 8 U.S.C. § 1251(a) (1), the homosexual exclusion provision did not relate back.

The Court of Appeals was wrong to conclude that § 1251(a) (1) required it to distinguish *Costello* and apply a "relation-back" theory to the petitioner — a theory which produces harsh and variable results depending upon when an alien entered the United States. Because the Court of Appeals' "relation-back" theory is contrary to *Costello* and presents an important issue of federal law, review by this Court is warranted.

CONCLUSION

For the reasons outlined above, petitioner respectfully submits that this Court should issue a writ of certiorari to the Court of Appeals for the Sixth Circuit to review its decision.

Respectfully submitted,

Carlos M. Recio
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777

No. 80-3733

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HERBERT CLYDE SQUIRES,
Petitioner,

v.

IMMIGRATION and NATURALIZATION SERVICE,
Respondent.

APPEAL from the Board of Immigration Appeals.

Decided and Filed October 7, 1982.

Before: KENNEDY, Circuit Judge; BROWN, Senior Circuit Judge; and DUNCAN, District Judge.*

DUNCAN, District Judge. Herbert Clyde Squires, a citizen of Canada currently residing in the United States, petitions this Court for relief from an order of the Board of Immigration Appeals directing him to leave the country. Both the Board and the immigration judge below found Squires to be deportable under 8 U.S.C. §§ 1251(a) and 1182(a)(9) as alien who had previously been convicted of a crime involving moral turpitude. Although we differ with those two tribunals in our reasoning, we affirm.

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* The Honorable Robert M. Duncan, Judge, U.S. District Court for the Southern District of Ohio, sitting by designation.

I

Squires entered the United States on or about June 14, 1979, as a nonimmigrant visitor for pleasure. He was authorized to remain in the country for a few days only. On July 30, 1979, the Immigration and Naturalization Service (INS) began deportation proceedings, charging that Squires was excludable on account of a previous criminal conviction in Canada. At the hearing which followed, it was shown that he had been convicted in a Canadian provincial court on August 11, 1970, of the crime of "false pretences." According to Squires the charges stemmed from his passing of a bad check in 1969 with knowledge that there were insufficient funds on account to cover it.[1] The records produced by INS show further that Squires was sentenced to six months' imprisonment for the crime, and that all six months were suspended. No other convictions appear on Squires' record.

The immigration judge found that Squires was subject to immediate deportation. He ruled that the offense for which Squires was convicted constituted a "crime involving moral turpitude" within the meaning of 8 U.S.C. § 1182(a)(9), and that Squires was thus an "excludable alien" for purposes of the deportation statute, 8 U.S.C. § 1251(a). The judge recognized the statutory exemption for crimes which are "petty," but he analogized Squires' offense to the domestic crime of false pretenses which, as codified presently, is a felony. On this basis he reasoned the Squires could not take advantage

[1] The precise nature of Squires' offense is not entirely clear, for neither the immigration judge nor the attorneys involved in the case questioned him about it at the deportation hearing. The Certificate of Conviction submitted by INS states simply that on or about September 5, 1969, Squires "unlawfully did by a false pretence, obtain $450.00 in Canadian currency from the Victoria and Grey Trust Co. Ltd., with intent to defraud." Squires had indicated in his initial brief that he obtained the funds by cashing a check at the trust company, despite knowledge on his part that there was not enough money on hand to cover the draft. This account of the crime has not been disputed by INS, and we accordingly adopt it as our own.

of the petty offense exception. INS was thus ordered to deport Squires at once.

In a short memorandum and order, the Board of Immigration Appeals allowed Squires the privilege of "voluntary departure" from the country, but it upheld *in toto* the immigration judge's findings with respect to deportability. This timely appeal followed.

Squires alleges, *inter alia*, that both the immigration judge and the Board of Immigration Appeals erred in comparing his crime to one which would be a felony in the United States. He contends that on the particular facts of this case, his offense should be considered a misdemeanor. The sole question before us, then, is whether the Canadian crime of "false pretences" is properly deemed to be a felony for purposes of 8 U.S.C. § 1182(a)(9).

II

Under Section 241(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(1), aliens who are in certain legally excludable classes at the time of their entry into the United States remain subject to deportation throughout their stay.[2] Among these classes, as defined by Section 212(a) of the Act, 8 U.S.C. § 1182(a), are those who have previously been convicted of a "crime involving moral turpitude."[3] An alien so convicted is ordinarily deportable, except that:

> . . . Any alien who would be excludable because of the conviction of a *misdemeanor classifiable as a petty*

[2] Section 1251(a) is set forth at page 12, *infra*.

[3] Here there is little question that Squires' crime was one of "moral turpitude." Any crime which requires intent to defraud as one of its elements fits into this category. *Jordan* v. *DeGeorge*, 341 U.S. 223, 227-232 (1951); *McNaughton* v. *INS*, 612 F.2d 457 (9th Cir. 1980); *Winestock* v. *INS*, 576 F.2d 234 (9th Cir. 1978); and, as the Board of Immigration Appeals pointed out, the Canadian crime of "false pretences" plainly has such a requirement. See § 319(1) of the Canadian Criminal Code.

> *offense* under the provisions of Section 1(3) of Title 18 [U.S.C.], *by reason of the punishment actually imposed*, . . . may be granted a visa and admitted to the United States.

(Emphasis added.) 8 U.S.C. § 1182(a)(9).

As is evident from its face, the statutory exemption has two distinct requirements. First, the crime must be a misdemeanor. Title 18, Section 1(2) defines a misdemeanor as any offense which is punishable by one year or less in prison.[4] Second, the crime must have been "petty" in terms of the punishment actually imposed. Title 18, Section 1(3) defines a petty offense as any misdemeanor, "the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500." The exception is thus quite narrow. An alien is not eligible under the exception if the prior conviction was punishable by more than a year in prison, *or* if the punishment actually imposed exceeded imprisonment for six months or a fine of $500.

Since Squires was sentenced in Canada to just six months in prison, none of which were actually served, his crime is clearly a petty offense "by reason of the punishment actually imposed," and he meets the second part of the Section 1182 (a)(9) proviso. His deportability thus turns in part on the first portion of the test—whether the crime should be characterized as a felony or a misdemeanor. Because the statute under which Squires was convicted, Section 304(1)(a) of the Canadian Criminal Code,[5] carries with it a maximum

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[4] Title 18, Section 1, provides in pertinent part that:

> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor. . . .

[5] At the time of Squires' conviction, Section 304(1)(a) codified the common law crime of "false pretences" and stated in part that:

> (1) Every one commits an offense who

punishment of ten years' imprisonment where the amount involved exceeds fifty dollars,[6] the crime would appear to be a felony under the statutory definitions set forth in 18 U.S.C. § 1(1) and (2), *supra*. The maximum penalty available under a foreign criminal code is not necessarily dispositive of the crimes characterization for purposes of United States immigration laws, however. To avoid the inconsistencies which would arise by virtue of varying penalties for similar crimes in different nations, the courts look not to the maximum penalty prescribed by foreign law, but rather to the maximum penalty for an analogous statutory offense under the laws of the United States. *Giammario* v. *Hurney*, 311 F.2d 285 (3d Cir. 1962); *Soetarto* v. *INS*, 516 F.2d 778 (7th Cir. 1975); *Patel* v. *INS*, 542 F.2d 796 (9th Cir. 1976). If an equivalent crime cannot be found in Title 18 of the United States Code, the reviewing authority must turn to the provisions of Title 22 of the District of Columbia Code. *Giammario*, 311 F.2d at 287; *Soetarto*, 516 F.2d at 780-781. *See also*, *Matter of Grazley*, 14 I & N Dec. 330 (BIA 1973); *Matter of Adams*, 10 I & N Dec. 593, 595 (BIA 1964); *Matter of T-*, 6 I & N Dec. 508, 517 (Atty. Gen. 1955). Our initial task, therefore, is to determine an appropriate statutory analog for Section 304(1)(a) of the Canadian Criminal Code.

A

The immigration judge concluded correctly that there is no federal offense which corresponds directly to Squires' crime. The D.C. Code offers two possibilities, however. Title

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(a) by false pretence . . . obtains anything in respect of which the offense of theft may be committed or causes it to be delivered to another person. . . .

The statute was renumbered without substantive change in 1970; it now appears as Section 320(1)(a). *See* 2 Crankshaw's Crim. Code (Canada) § 320 (8th ed. 1979).

[6] The minimum amount required under the statute has since been changed to $200. *See* 2 Crankshaw's Crim. Code, *supra* at § 320.

22, Section 1301 describes the crime of "false pretenses" and provides in part that:

> (2) Whoever, by any false pretenses, with intent to defraud, obtains from any person any service or anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money, property, or service so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years.

Since an offense under this section is punishable by more than a year in prison, it is plainly a felony. If it is the proper domestic analog to Squires' crime in Canada, then he is clearly excludable.[7]

The D.C. Code also contains a "bad check" statute, 22 D.C. Code § 1410. That section, as it existed at the time of Squires' conviction, stated:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon

[7] In *Matter of Grazely*, 14 I & N 330 (1973), the Board of Immigration Appeals indicated that Section 1301 is indeed the proper statutory analog to the Canadian false pretences statute. There, however, petitioner was held to be within the petty offense exception. Although the Board did not elaborate on its reasons for considering petitioner's crime a misdemeanor, it hinted that the offense involved less than fifty dollars, thus rendering it a misdemeanor under both Sections 1301 and 304(1)(a).

> any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both.

By its own terms this crime was a misdemeanor when Squires was convicted in Canada. It has since been changed to a felony punishable by one to three years' imprisonment where the amount involved exceeds $100.[8] If this is the appropriate statutory equivalent of Squires crime, and if Squires is entitled to the benefit of the statute as it existed at the time of his conviction, then he qualifies for the § 1182(a)(9) exemption and is therefore non-excludable.

Both the immigration judge and the Board of Immigration Appeals chose Section 1301 as the proper equivalent offense. Their reasons for doing so were not set forth, but it appears that they relied simply upon the nominal likeness between Section 1301 and the provision under which Squires was actually convicted. Both sections codify the common law crime of false pretenses in their respective jurisdictions, and each requires proof of similar elements. *Compare Cuillo* v. *United States*, 325 F.2d 227 (D.C. Cir. 1963); and *United States* v. *Alston*, 609 F.2d 531 (D.C. Cir. 1979); with *R.* v. *McDonald*, 3 Crim. Rptr. (Canada) 259 (N.S. Ct. App. 1946); *R.* v. *Kinsey*, 7 Crim. Rptr. 67 (Alta. S.Ct. 1948); and

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[8] Title 22, Section 1410 was amended on October 22, 1970, a little more than two months after Squires' conviction. It now provides that bad check violators shall:

> if the amount of such check, draft, order or other instrument is $100 or more, be guilty of a felony and fined not more than $3,000 or imprisoned for not less than one year nor more than three years or both; or if the amount of such check, draft, order or other instrument is less than $100 be guilty of a misdemeanor and fined not more than $1000 or imprisoned not more than one year, or both.

R. v. *Kaszas*, 19 Crim. Rptr. 159 (Alta. Dist. Ct. 1954).

We believe, however, that the extreme importance of the interest at stake here requires us to look beyond such facial similarities. As the Supreme Court has observed on many occasions,

> deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 332 U.S. 388 [1947]. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe [a] statutory provision less generously to the alien might find some support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. *Phelan*, 333 U.S. 6, 10 (1948). *See also*, *Barber* v. *Gonzales*, 347 U.S. 637 (1954); *Costello* v. *INS*, 376 U.S. 120 (1964); *INS* v. *Errico*, 385 U.S. 214 (1966); *Woodby* v. *INS*, 385 U.S. 276 (1966). This principle has been widely invoked in deportation cases, and it requires the courts to interpret all aspects of the immigration laws, including the Section 1182(a)(9) proviso, liberally in favor of the alien. *Accord*, *Marino* v. *INS*, 537 F.2d 686 (2d Cir. 1976).

In determining whether a foreign crime constitutes a misdemeanor for purposes of Section 1182(a)(9), then, it is not enough to rely solely on the label attached to a particular crime by a particular foreign nation. Because deportation involves such serious consequences, a potential deportee is entitled at least to have his previous conviction viewed in light of all the circumstances. The reviewing authorities must choose an equivalent domestic offense only after considering in some depth both the facts which led to the conviction and the differences which may exist between the foreign statutory scheme and its counterpart in the United States. The test is one of basic fairness; a domestic criminal

statute is suitable as an equivalent offense under Section 1182(a)(9) only if, under all the circumstances, both factual and legislative, it would be fair to hold the alien accountable for a violation thereunder.

On the facts before us, we are not convinced that it would be fair to view Squires as though he had been convicted under 22 D.C. Code § 1301. Upon review of the relevant criminal laws of Canada, it is clear that Squires was originally charged with the Canadian crime of "false pretences" because there was no statutory alternative. Section 304(1)(a) of the Canadian Criminal Code, unlike its counterpart in the District of Columbia, does not have a lesser included offense designed specifically for the passing of worthless checks. Indeed, all bad check violators in Canada are prosecuted, if at all, under Section 304(1)(a). *See Malo* v. *R.*, 18 Crim. Rptr. 154 (Que. Ct. App. 1954); *Blevin* v. *R.*, 19 Crim. Rptr. 183 (Que. Ct. App. 1954); *R.* v. *Morphett*, 13 Crim. Rptr. (n.s.) 270 (B.C. Ct. App. 1970). *See also*, 2 Crankshaw's Crim. Code § 320 n. 11 (8th ed. 1979); 6 C.E.D. 2d, Crim. Law § 77 (1958); and Mewett & Manning, Criminal Law (Canada) 515-519 (1978).[9] By contrast, one who has knowingly negotiated a worthless draft in the District of Columbia may be prosecuted under either Section 1301 or Section 1410. *See Cuillo, supra.* The latter is a lesser included offense of the former, and, as is evident from its language, Section 1410 is aimed specifically at bad checks. *Id.*

Had Squires committed his crime in the District of Columbia, he could perhaps have been charged with false

[9] Under subsections 304(1)(c) and (d), now renumbered 320(1)(c) and 320 (1)(d), anyone who knowingly makes a false statement in writing to procure the payment of money or the acceptance of a check is guilty of an offense punishable by up to ten years in prison. We have found nothing in the relevant Canadian authorities to suggest that either of these subsections have ever been used to prosecute bad check violators. In fact Section 304(4), now renumbered as Section 320(4), suggests that 304(1)(a), now 320(a)(1), is the proper provision under which to charge such offenders.

pretenses under Section 1301. Given the particular circumstances of his crime, however, it is more likely that Squires would have been prosecuted under Section 1410, or would at least have had an opportunity to plead guilty thereunder. From the facts adduced at the deportation hearing, it appears that Squires' crime was little more than a routine bad check violation. There is no indication that Squires was involved in a conspiracy, or that he was engaged in an ongoing practice of writing worthless checks.[10] The amount of money involved was somewhat modest, and the record suggests that this was Squires' first offense. Moreover, the trial judge's imposition of a relatively light sentence indicates that, in his eyes at least, the offense was relatively minor.

Section 1410 thus seems to be more closely tailored to the particulars of this crime than does Section 1301, and INS has introduced nothing to show that Squires' actions were in any sense more heinous than those proscribed by the bad check statute.[11] Under these circumstances we find 22 D.C. Code § 1410 to be a more fitting analog to Squires' offense. We do not mean to imply the lesser of two potential equivalent offenses must always be selected in deportation proceedings. We conclude simply that on these rather peculiar facts, it would be unfair to equate Squires' foreign conviction with the domestic crime of false pretenses.

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[10] The documents submitted by INS show that a criminal complaint was filed in Canada against Squires late in 1969. It charged that Squires had obtained $100 in cash from the Victoria and Grey Trust Co., Ltd. by false pretences, on or about September 15, 1969—a few days after the crime at issue here. According to the testimony elicited at the deportation hearing, this latter charge was withdrawn. We therefore attach no significance to it. *See* App. 28 (Transcript of Hearing at 6).

[11] Had INS shown, for example, that Canada has a lesser included offense under Section 304(1)(a) for bad checks, but that Squires was for some reason charged and convicted on the greater offense, then the immigration judge could properly have inferred that Squires' crime was of a more serious nature than that reflected by the bad check statute. Under those circumstances he would perhaps have been justified in choosing Section 1301 over Section 1410 as the more appropriate domestic equivalent. Absent such mitigating circumstances, however, the selection of the greater offense is unjustifiable.

B

Our inquiry does not end there, however. Since Section 1410 was amended shortly after Squires was convicted in Canada, and a violation thereunder now constitutes a felony if the amount involved is more than $100, we must also consider whether the change in classification applies to aliens who were convicted prior to the change, but who entered the country well afterward. Squires urges us to recognize a rule which would require the foreign conviction to be classified as a misdemeanor so long as its domestic equivalent was so classified at the time of conviction. This "time of conviction" rule would allow Squires to avail himself of the petty offense exception of 42 U.S.C. § 182(a)(9), and thus stave off deportation. INS, however, advocates a "time of entry" rule which would require the prior conviction to be analogized to a domestic equivalent offense as it existed at the time of entry into the United States. This latter rule would of course have the opposite effect on Squires.

Neither of the two proposed rules is specifically mandated by statute or regulation, and we are aware of no court which has resolved the issue. We are therefore left to general principles of statutory construction, as well as to the underlying policies reflected by the language, structure, and legislative history of the statutes involved. Among these principles is the general prohibition expressed in *Fong Haw Tan, supra,* against broad statutory interpretations which unduly restrict the freedom of the alien "beyond that which is required by the narowrest of several possible meanings of the words used." 333 U.S. at 10. In selecting an appropriate statutory analog for Squires crime, we have placed great stock in this case. In choosing between a "time of conviction" rule and a "time of entry" rule, however, we believe that our reliance thereon must yield to the language of the pertinent statutes and the policy considerations inhering within.

Section 1251(a), the deportation statute, provides in part that:

> Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who:
>
> (a) at the time of entry was within one or more of the classes of aliens excludable *by the law existing at the time of such entry*.

(Emphasis added.) By referring to "the law existing at the time of . . . entry," Congress clearly intended deportability to turn on contemporary federal statutes governing excludable classes, including Section 1182(a)(9).[12] An alien who enters the country subsequent to an amendment in Section 1182(a) or any other excludability provision is thus viewed in light of the new amendment, even though the act or omission which gives rise to excludability occurred well before the change in the law. Whether this same principle was intended to apply to changes in the underlying criminal law upon which domestic equivalent offenses are determined is not altogether clear from the legislative history, however. Since the petty offense proviso to Section 1182(a)(9) was not added until two years after enactment of Section 1251(a),[13] and since the courts did not begin to analogize foreign crimes to domestic offenses until even later,[14] it cannot be said that Congress expressly intended the "time of . . . entry" language in Section 1251(a)(1) to apply to changes in criminal statutes as well as to amendments in the immigration laws. Based on our review of the legislative history surrounding Section 1251(a), though, we believe that such an interpretation is fully consistent with the purposes and policies behind the provision.

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[12] See H.R. Rep. No. 1365, 82d Cong. 2d Sess. —— (1952), reprinted in [1952] U.S.C.C.A.A.N. 1653, 1715-16.

[13] The petty offense exception was added to Section 1182(a)(9) in 1954. *See* Pub. L. 54-770 § 4 (Sept. 3, 1954). *See also* Sen. Rep. No. 1600, 83d Cong., 2d Sess. —— (1954), reprinted in [1954] U.S.C.C.A.A.N. 3919.

[14] See *Giammario* v. *Hurney*, 311 F.2d 285 (3d Cir. 1962).

As has been noted above, Section 1251(a)(1) was enacted as part of the Immigration and Nationality Act of 1952, a comprehensive legislative package revamping the immigration laws to suit this country's post-war needs. Subsection (a)(1) of the statute was passed as originally drafted by both chambers of Congress, and there is little, either in the committee reports or in the extensive debate on the bill, to indicate precisely what Congress meant when it referred to "the law existing at the time of . . . entry."[18] The House Report on the Act as a whole, though, begins with a lengthy survey of immigration law and policy in the United States from the late 18th Century onward. H.R. Rep. No. 1365, 82d Cong., 2d Sess. — (1952) *reprinted* in [1952] U.S.C.C.A.A.N. 1653-1674. In it the sponsors of the bill trace the countless changes that have taken place in these laws since the birth of the nation, as well as the specific reasons for those changes. The report also suggests that in contrast to fundamental constitutional provisions, immigration laws are highly sensitive to shifts in popular attitudes toward particular nations or residents thereof. Historically, according to this commentary, the laws of immigration and nationality have changed constantly to reflect current United States foreign and economic policy.

From this legislative background, it is evident that in adopting Section 1251(a), Congress intended deportation proceedings to be consistent with the current state of the law. In directing these proceedings to be conducted in light of "the law existing at the time of . . . entry," Congress thus insured that immigration officials deported only those individuals who were somehow "undesirable" by contemporary

[18] For a complete legislative history, see H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted* in [1952] U.S.C.C.A.A.N. 1653, Conf. Rep. No. 2096, 82d Cong., 2d Sess. (1952), *reprinted* in [1952] U.S.C.C.A.A.N. 1753. *See also* 98 Cong Rec. 4301-4320, 4399-4416, 4422-4444 (debates on H.R. 5678); 98 Cong. Rec. 5088-5116, 5149-5181, 5207-5219, 5228-5240, 5314-5322, 5326-5334, 5408-5442, 5607-5631, 5637-5638, 5756-5804 (debates on S. 2550).

standards. It also insured that individuals within newly formed classes of excludability could be deported whether or not they had already entered the United States.

Concededly the substantive criminal law used to determine domestic equivalents is less susceptible to the shifting tides of foreign and economic policy than is the law of immigration and nationality. To the extent that an amendment of a criminal statute signals a change in public attitudes toward the seriousness of a particular crime, though, the newer view should be reflected in the immigration laws. In Squires' case the upgrading of a bad check offense from a misdemeanor to a felony indicates that at the time he entered the country the crime was thought to be more reprehensible than originally suspected, at least within the District of Columbia. Measured by the contemporary standards existing at the time of Squires' entry, then, Squires is an ex-felon. To treat him accordingly for purposes of deportation is wholly consistent with the language of Section 1251(a)(1), as well as its history and underlying policy.

Squires' main objection to the "time of entry" rule is that it would give retrospective applicability to the current version of the District of Columbia's bad check statute. He argues that by applying Section 1410, as amended, to his crime in Canada, the Court would in effect be adopting a "relation-back" theory in direct contrast to the principles laid down in *United States ex rel. Brancato* v. *Lehman*, 239 F.2d 663 (6th Cir. 1956), and *Costello* v. *INS*, 376 U.S. 120 (1963). INS responds simply and without elaboration that use of the current bad check law would not in any way amount to a retroactive application of it.

We find both arguments wide of the mark. To some extent the proposed "time of entry" rule does involve an element of retroactivity, since it would allow an amendment in the criminal law to be applied in such a way as to confer "ex-felon" status upon an alien who might earlier have been considered only an ex-misdemeanant. The harsh consequences

occasioned by this "relation-back" of the current law are immediately apparent. Under the "time of entry" rule, Squires is deportable for having committed a crime in Canada now deemed to be a felony in the United States. Had he entered the United States prior to the amendment of the bad check statute, however, the same crime would have been considered a misdemeanor, and Squires presumably would have been non-excludable under Section 1182(a)(9), hence non-deportable under Section 1251(a)(1).

On its face this rather anomalous result would appear to run counter to precedent both from this circuit and from the Supreme Court. In *United States ex rel. Brancato* v. *Lehman, supra,* we held that while denaturalization voids an individuals citizenship *ab initio,* it cannot relate back to destroy his or her status as a citizen for purposes of the deportation statute. We also expressed general disapproval of the relation-back theory offered by the government, relying in part upon *Fong Haw Tan* and *Barber* v. *Gonzales,* both *supra.*

The Supreme Court reaffirmed this view a few years later in *Costello* v. *INS, supra.* There petitioner had become a naturalized citizen in 1925, but had been convicted on two counts of tax evasion in 1954. When it was discovered later that his citizenship had been obtained fraudulently, his certificate of naturalization was cancelled. INS subsequently sought to deport him under Section 1251(a)(4) as an alien who, after entry, had been convicted of two crimes of moral turpitude. INS theorized that since Costello's citizenship had been voided *ab initio,* he was actually an alien when he committed his crimes, not a naturalized citizen.

The Court observed that Section 340(a) of the Act, 8 U.S.C. § 1451(a), gives retrospective force to a denaturalization order, but it refused to interpret this feature of the statute to make the general deportation provision applicable to denaturalized citizens who commit crimes prior to their denaturalization. Expressly rejecting the argument by INS that denaturalization related back to deny Costello's status as a citizen under Sec-

tion 1251(a)(4) at the time of the crimes, the Court stated that:

> The relation-back concept is a legal fiction at best, and even the respondent concedes that it cannot be "mechanically applied." With respect to denaturalization itself, Congress clearly adopted the concept in enacting § 340(a) [8 U.S.C. § 1451(a)]. But in the absence of specific legislative history to the contrary, we are unwilling to attribute to Congress a purpose to extend this fiction to the deportation provisions of § 241(a)(4) [8 U.S.C. § 1251(a)(4)].

376 U.S. at 130. *See also Barber* v. *Gonzales, supra;* and *Eichenlaub* v. *Shaughnessy,* 338 U.S. 521 (1950).

Notwithstanding this general reluctance to attach retrospective effect to the deportation laws, we believe that neither *Brancato* nor *Costello* are dispositive of the case at bar. Each of these cases interprets statutes which are not directly at issue here. More importantly, both decisions are premised on the utter lack of any authority in the texts or legislative histories regarding retroactivity. Here, however, by referring to "the law existing at the time of . . . entry," Congress expressly designed Section 1251(a)(1) to reflect changes in the laws of excludability. Although for reasons outline above, it did not do the same for changes in criminal statutes used to analogize to foreign convictions, such an interpretation is completely in keeping with the language and the purpose of the deportation statute. Unlike the courts in *Brancato* and *Costello,* therefore, we have explicit, albeit indirect, authority for using the relation-back concept in construing the statute before us. Accordingly, we believe these cases to be distinguishable.

In adopting a "time of entry" rule we are not unmindful of the harsh result our ruling will visit upon Squires and others like him. Indeed, we are keenly aware that under the proposed rule Squires will be subjected to an added loss of priv-

ileges on account of his prior conviction, even though he was not subject to this same "penalty" at the time he was convicted. If this deprivation truly amounted to punishment for the crime that was committed, then it would clearly be barred by the constitutional prohibition against *ex post facto* laws. Deportation on the basis of misconduct serves an entirely different purpose than does punishment for the misconduct itself, however, and the Supreme Court has repeatedly underscored the distinction by refusing to place the two on equal constitutional footing. *See, e.g., Eiku* v. *United States*, 142 U.S. 651 (1892); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893); and *Mahler* v. *Eby*, 264 U.S. 32 (1924). In *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), for example, the Court upheld the validity of the Alien Registration Act of 1940, which allowed deportation of resident aliens who had belonged to the Communist Party prior to passage of the Act. In response to the argument that the Act amounted to an *ex post facto* law, the Court explained:

> . . . even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the *ex post facto* provision which has been followed by this Court from earliest times. It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. Both of these doctrines as original proposals might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them. In *Bugajewitz* v. *Adams*, 228 U.S. 585, 591, Mr. Justice Holmes, for the Court, said: "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation

> a punishment: it is simply a refusal by the Government to harbor persons whom it does not want."

(Footnotes omitted.) 342 U.S. at 594. In light of our determination that a "time of entry" rule is consistent with the legislative intent behind Section 1251(a), then, we must reluctantly tolerate the effect our ruling will have on those like Squires who are prejudiced by the amendment of a domestic criminal statute.[16]

We are also aware of the inconsistencies that may arise from a "time of entry" rule. It is entirely possible, for instance, that two resident aliens, both of whom were convicted in the same foreign country for the same crime at the same time, may experience oposite results in deportation proceedings, depending upon the precise moment of time in which each entered the United States. The inconsistent outcomes engendered by such a rule are no greater than those which are possible under a "time of conviction" rule, however. The latter rule would potentially lead to inconsistent treatment of resident aliens who violated the same criminal statute in the same foreign country, but who were convicted at slightly different points in time. Both of the proposed rules are thus somewhat arbitrary, and both are susceptible to harsh and inconsistent results in particular cases. We choose the former only because we believe it to be fully in accord with the framework and the historical background of the deportation statute.

For these reasons we conclude that while Squires' offense must be analogized to a violation of the District of Columbia

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[16] We hasten to point out that a "time of entry" rule will presumably benefit some aliens. Although those who are subject to a domestic equivalent offense that has been upgraded to a felony may be excluded from the country, those who are subject to an equivalent that has been downgraded to a misdemeanor will accordingly be able to remain here. Whether the "time of entry" rule results in a greater or lesser number of exclusions than that resulting under a "time of conviction" rule thus depends in part on the number of statutory analogs which are being upgraded relative to those that are being downgraded.

bad check statute, 22 D.C. Code § 1410, the crime must also be considered in light of Section 1410 as amended in 1970. Since violation of that statute amounted to a felony at the time of Squires' entry into the United States, Squires is an excludable alien under 8 U.S.C. § 1182(a)(9), and he is subject to deportation under 8 U.S.C. § 1251(a)(1). Although we do not concur with the rationale employed by the Board of Immigration Appeals in finding Squires deportable, we do agree with its ultimate conclusion. The Board's judgment and order are accordingly AFFIRMED.

No. 80-3733

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

DEC 21 1982

JOHN P. HEHMAN, Clerk

Herbert Clyde Squires,)

Petitioner)

v.) ORDER

Immigration and Naturalization Service,)

Respondent)

BEFORE: KENNEDY AND BROWN, Circuit Judges; DUNCAN, J., District Judge.

This matter is before the Court on a petition for rehearing and suggestion of rehearing en banc in the above-styled case. No judge in active service having moved for rehearing en banc, the motion has been referred to the panel which heard the action originally. The panel has noted nothing of substance in the motion for rehearing which was not carefully considered before issuance of the Court's opinion. The motion is therefore denied.

Petitioner has also suggested that, in the event his motion for rehearing is denied, the Court should modify its affirmance of the Board of Immigration Appeals to make clear that petitioner has the right of voluntary departure pursuant to the Board's previous order and 8 U.S.C. §1254(e). This request is well taken and is accordingly granted. Petitioner Squires shall have thirty (30) days from the

issuance of this order or the termination of any valid stay of deportation to depart voluntarily from the United States.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

MATTER OF SQUIRES

In Deportation Proceedings

A-22712143

Decided by Board October 23, 1980

(1) Unlawfully obtaining by a false pretence $450.00 in Canadian currency with intent to defraud in violation of section 304(1a) of the Criminal Code of Canada is a crime involving moral turpitude.

(2) False pretence under section 319(1) of the Criminal Code of Canada is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act upon it.

(3) A crime committed under section 304 of the Criminal Code of Canada cannot be considered a petty offense where the value of what is obtained exceeds $50.00 and punishment can be a term of imprisonment for ten years.

(4) A conviction for intent to defraud has, as a general rule, been held to involve moral turpitude.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(1) [8 U.S.C. 1251(a)(1)] - Excludable - convicted of a crime involving moral turpitude; false pretences

ON BEHALF OF RESPONDENT: Harry Kobel, Esquire
Rosin & Kobel
2156 City National Bank Building
Detroit, Michigan 48226

BY: Milhollan, Chairman; Maniatis, Appleman, and Maguire, Board Members

In a decision dated October 30, 1979, an immigration judge found the respondent deportable under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as an alien excludable at the time of entry for having been convicted of a crime involving moral turpitude under section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9) and denied voluntary departure. The respondent has appealed. The appeal will be dismissed as to the issue of deportability and granted as to voluntary departure.

The respondent is a 50-year-old divorced male alien, a native and citizen of Canada who, according to the allegations contained in the Order to Show Cause, entered the United States on June 14, 1979, as a nonimmigrant visitor for pleasure authorized to remain until June 17, 1979. 1/ He had been employed in the business of public relations in Canada but conceded that presently he is not employed in Canada. The respondent further testified that he is presently engaged in making a business known as "Emily Across the Street" a success and without him the business would have failed. The respondent contends that he fell in love with the owner of the business that was not doing well and decided to give up his business in Canada and concentrate on making "Emily Across the Street" successful. He concedes that he was engaging in his usual business of public relations for the past year without any monetary return, but did so out of love. 2/

1/ The respondent testified that he could not remember the exact date of his entry and how long he was authorized to stay but it was between June 14 and July 10, 1979.

2/ The respondent testified that he had an agreement with the owner of "Emily Across the Street" but he did not give the details of the agreement.

The Order to Show Cause issued the respondent on July 10, 1979, charges that he is excludable under the provisions of section 212(a)(9) of the Act for having committed a crime involving moral turpitude prior to entry which was not a petty offense.

The respondent admitted and evidence was submitted to show that he was convicted on August 11, 1970 in the Provincial Court of Canada (Criminal Division) of the crime of unlawfully obtaining by a false pretence $450.00 in Canadian currency from Victoria and Grey Trust Co. Ltd. with intent to defraud in violation of section 304(1a) of the Criminal Code of Canada. The sentence was suspended and the respondent was given probation for six months.

On appeal, the respondent through counsel contends that because of the sentence imposed, his conviction is a petty offense and that he should be granted voluntary departure as a matter of discretion.

The questions presented is whether the respondent's conviction for unlawfully obtaining $450.00 by a false pretence is a crime involving moral turpitude and whether this crime is classifiable as a petty offense. False pretence under section 319(1) of the Criminal Code of Canada is defined as follows: A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act upon it.

The immigration judge found that the respondent's conviction was for a crime involving moral turpitude. Section 304 of the Canadian statute provides:

> (1) Everyone commits an offense who (a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offense of theft may be committed or causes it to be delivered to another person; . . .

> (2) Everyone who commits an offense under paragraph (a) of subsection (1) is guilty of an indictable offense and is liable, to imprisonment for ten years . . . where the value of what is obtained exceeds $50.00 . . . .

When this crime is measured by United States standards, it cannot be considered a misdemeanor and therefore cannot be considered a petty offense. Section 1 of Title 18, United States Code provides: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony. Further, a conviction for intent to defraud has, as a general rule, been held to involve moral turpitude. See U.S. ex. rel. Portada v. Day, 16 F.2d 328 (S.D.N.Y. 1926); Matter of P-, 3 I&N Dec. 56 (C.O. 1947; BIA 1948); Matter of C-O-, 8 I&N Dec. 488 (BIA 1959). The immigration judge concluded that the respondent had been convicted of a crime involving moral turpitude not classifiable as a petty offense and that his deportability had been established by clear, convincing, and unequivocal evidence.

The respondent's application for voluntary departure was denied as a matter of administrative discretion by the immigration judge. The immigration judge found that a nonimmigrant visitor has no authorization to work in the United States even if no money is paid. The immigration judge further found that the immigration laws themselves are undermined when aliens without permission engage in their professional occupation for an extended period of time and thereafter defeat the intent of section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14) by claiming that they have refrained from competing with United States labor. The immigration judge concluded that the respondent's engagement in his public relations business by preventing the business of his "girl friend" from failing and by assisting in all aspects of the running of the store was engaging in employment without complying with the normal visa requirements.

We agree with the finding of the immigration judge that the respondent's convictions under section 304(a) of the Criminal Code of Canada is a crime involving moral turpitude and is not classified as a petty offense. We conclude that the respondent's deportability under sections 241(a)(1) of the Act as an alien who at the

time of entry was excludable as one who was convicted of a crime involving moral turpitude under section 212(a)(9) of the Act has been established by clear, convincing, and unequivocal evidence.

In our review of the record, we do not find that the respondent's conviction or his unauthorized employment is so unfavorable as to preclude him from the benefit of voluntary departure. Therefore, the decision of the immigration judge denying the respondent the privilege of voluntary departure is reversed.

ORDER: The appeal is dismissed as to the finding of deportability and sustained as to voluntary departure.

FURTHER ORDER: The outstanding order of deportation is withdrawn, and in lieu of an order of deportation the respondent is allowed to depart voluntarily, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director and under such conditions as he may direct. In the event of the respondent's failure to so depart, the order of deportation will be reinstated and executed.

U S GOVERNMENT PRINTING OFFICE: 1980 341-243/20

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

OCT 3 0 1979

File: A22 712 143 - DET

In The Matter Of)
)
Herbert Clyde SQUIRES) IN DEPORTATION PROCEEDINGS
)
Respondent)

CHARGE: Section 241(a)(1) of the I & N Act, in that at time of entry alien was excludable by law as one who was convicted of a crime involving moral turpitude under Section 212(a)(9) of the Act: False Pretences

APPLICATION: 1. Termination of proceedings
2. Voluntary departure

IN BEHALF OF RESPONDENT:

Harry Kobel, Attorney
2156 City National Bank Bldg.
Detroit, Michigan 48226

IN BEHALF OF SERVICE:

Oliver H. Claypool, Jr.
Trial Attorney
Detroit, Michigan

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 49-year old divorced male alien, native and national of Canada, who entered the United States as a visitor for pleasure on a date he alleges to be between June 14, 1979 but prior to July 10, 1979. He is by occupation in the business of Public Relations and alleges he attained two years of college credits for business administration and two years of physical education. He conceded he has no present employment in Canada, but has joined with Emily, the proprietor of a business in Detroit, Michigan, known as "Emily Across the Street". His testimony is that he "Turned her business around." It was his testimony that had he not assisted Emily, the business would have failed.

042

"About two years ago," he testified, "Emily and I fell in love and for about the first six months we kept everything separate. After that we decided that if we didn't do something we would have to close the doors of the business."

It was thereafter decided on the basis of allegedly being in love that the respondent discontinued his Canadian business and concentrated on the business of making "Emily Across the Street" successful. He concedes he was engaging in his usual business of public relations for the past year or more, but without monetary return. He concedes he would not contribute his efforts to any others without payment or monetary consideration but was doing so for Emily because they were in love.

The Service issued an order to show cause on July 10, 1979 and the first two allegations were conceded by the respondent on this record. Allegations three and four were neither admitted nor denied with leave to explain. Leave so to do was granted. Allegation five was admitted but deportability was denied.

Allegation three, though not admitted nor denied, was explained as being an incorrect date since there was an additional entry by the respondent as a nonimmigrant visitor between June 14, 1979 and the date of issue of the order to show cause. There is testimony on this record that on advice of counsel he declined to depart from the United States until the issue of his deportability was thereafter decided. Respondent did not know, nor could he remember, the period of time for which he was permitted to enter as a nonimmigrant visitor for pleasure.

and therefore he could not admit nor deny allegation four contained in the order to show cause. The Service in its charge of deportability alleges respondent was excludable at the time (anytime) of entry. As one, subject to the provisions of Section 212(a)(9), having committed a crime involving moral turpitude prior to entry which was not a petty offense. There are two issues to be decided in this case. The first, is the respondent deportable as charged in the order to show cause? Was he excludable at time of entry being guilty of a crime involving moral turpitude which was not a petty offense? The second, does respondent merit the relief of voluntary departure if he is found deportable?

As to the question of deportability I find him deportable as charged. The Canadian conviction record establishes the crime as a violation of Section 304(a) of the Criminal Code of Canada, the specific violation was:

> "Unlawfully did by a false pretence, obtain $450,00 Canadian currency from the Victoria and Gray Trust Company, Ltd., with intent to defraud."

The sentence was suspended and he was given: "Probation for six months."

On the one hand, respondent (through counsel) asserts he is not deportable as charged because,

> "the penalty actually imposed makes the crime a petty offense."

While my characterization of his position may be an oversimplification I find that this is the overall position that he has taken,

On the other hand, the Service asserts that since the crime itself when measured by U.S. standards, cannot be considered a misdemeanor. It therefore cannot be deemed a "petty offense".

I find that the Service analysis is the correct one. Reference is had first to the Canadian statute:

> "Section 304(1)(a) sets out the offense while subsection (2) entitled "punishment" states:
>
> > "everyone who commits an offense under paragraph (a) of subsection (1) is guilty of an indictable offence and is liable, to imprisonment for ten years .... where the value of what is obtained exceeds $50.00 or ...."

Section 1, or Title 8 United States Code clearly establishes that;

> "(1) any offense punishable by death or imprisonment for a term exceeding one year is a felony."

The District of Columbia Code at Title 11 Sec. 1301 titled False Pretenses, in pertinent part reads:

> "Whoever, by any false pretense with intent to defraud, obtains from any person anything of any value .... shall, if the value, ... or sum or value of the money or property so obtained, procured, sold, bartered or disposed of, is $100.00 or more .... be imprisoned not less than one year nor more than three years; . . . . "

Matter of C_____ O_____ Volume 8 I&N DEC 488 and following contain the most thorough analysis of this question and also contains citations of Congressional intent. (Page 491). From that decision on page 491 I cite the following:

> "We conclude that the respondent cannot qualify as a petty offender under 18 U.S.C. 1(3) for the reason that it is clear from the legislative intent of the sponsors that the classification of petty

045

> offense under that Section is limited by 18 U.S.C. 1(1) and 1(2), to persons convicted of misdemeanors which are punishable by imprisonment which does not exceed one year."

There is also the analysis contained in Gordon and Rosenfield Section 2.43(b) beginning at page 2-330 and contains five tests on admissability of persons convicted of a petty offense. It is most significant that the second test requires that "the crime must be a misdemeanor". I find that the Service has established by evidence that is clear, convincing and unequivocal that the respondent is deportable from the United States to Canada on the charge contained in the order to show cause. It is to be noted that respondent named Canada as the country to which he would be sent if deported.

I considered the request for voluntary departure and deny that request as a matter of discretion.

There is no authority for entry for employment in the United States on the basis of "love". In fact, even where there is a marriage or where there is an immediate relative relationship, it is necessary for certain documentary preliminaries be submitted to the Service for permission to work. Ifind that the authorization to be employed granted by the Service contains no notation that the employment must be for "money". It is a fact, therefore, that immediate relative relationship does not in itself authorize a grant of a work permit, nor do I know of a situation where a person who seeks to enter the United States as a nonimmigrant visitor for pleasure may be granted permission to work, he must be in some other status in order to qualify for permission to work where such permissio

is granted. It is essential that the law enforcement problems of this nation not be undermined by the glib explanations of persons who enter the United States, engage in their professional occupations for an extended period of time and thereafter successfully defeat the intent of Sec. 212(a)(14), by claims that they refrain from competing with United States labor. Whatever subterfuge, whether it be the guise of love, good intentions, or other is not acceptable. The attempt of this respondent to successfully engage in his public relation business, and by his own words preventing this business from failing, shows that he successfully engaged in his occupation in the United States and at least in my opinion was under the circumstances, employed without complying with the normal visa issuing requirements.

ORDER: IT IS ORDERED that the respondent be deported to Canada on the charge contained in the order to show cause.

Immigration Judge

C47

No. 82-1219

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT CLYDE SQUIRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

THOMAS W. HUSSEY
ROBERT KENDALL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals properly upheld the determinations of the immigration judge and the Board of Immigration Appeals that petitioner is a deportable alien pursuant to 8 U.S.C. 1251(a)(1) because, at the time of his entry into the United States, petitioner was excludable under 8 U.S.C. 1182(a)(9) on the basis of his prior conviction for a crime involving moral turpitude.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Chiaramonte v. *INS*, 626 F.2d 1093 ..... 7, 8

Costello v. *INS*, 376 U.S. 120 9

Fiallo v. *Bell*, 430 U.S. 787 10

Fong Yue Ting v. *United States*, 149 U.S. 698 10

Giammario v. *Hurney*, 311 F.2d 285 7

Grazley, In re, 14 I. & N. Dec. 330 7

INS v. *Wang*, 450 U.S. 139 11

Katzanis, In re, 14 I. & N. Dec. 266 7

Knauff v. *Shaughnessy*, 338 U.S. 537 10

Knoetze v. *United States Department of State*, 634 F.2d 207, cert. denied, 454 U.S. 823 7

Nishimura Ekiu v. *United States*, 142 U.S. 651 10

Pino v. *Nicolls*, 215 F.2d 237, rev'd on other grounds, 349 U.S. 901 8

Page

Cases—Continued:

Soetarto v. *INS*, 516 F.2d 778 7

United States ex rel. Brancato v. *Lehmann*, 239 F.2d 663 9

Zinnanti v. *INS*, 651 F.2d 420 ..... 8, 9

Statutes:

Immigration and Nationality Act, 8 U.S.C. (& Supp. V) 1101 *et seq.*:

Section 212(a)(9), 8 U.S.C. 1182(a)(9) 2, 4, 5, 7, 8, 9, 11

Section 241(a)(1), 8 U.S.C. 1251(a)(1) 1, 2, 9, 11

18 U.S.C. 1 7

Can. Crim. Code, *reprinted in* J. Martin, A. Mewett & I. Cartwright, *Martin's Annual Criminal Code* (1970):

Section 304 3

Section 304(1)(a) 3, 7

D.C. Code Ann.:

§ 22-1301 (1973) 3, 4, 6, 7, 8

§ 22-1410 (1967) 5

§ 22-1410 (1973) 4, 5, 6, 8, 9, 10, 11

Miscellaneous:

1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* (1977) 7

In the Supreme Court of the United States

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HERBERT CLYDE SQUIRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 689 F.2d 1276. The decisions of the Board of Immigration Appeals (Pet. App. 22-26) and the immigration judge (Pet. App. 27-32) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1982. A petition for rehearing was denied on December 21, 1982 (Pet. App. 20-21). The petition for a writ of certiorari was filed on January 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 8 U.S.C. 1251(a)(1) provides:

> (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who —

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry[.]

2. 8 U.S.C. 1182(a)(9) provides in pertinent part:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(9) Aliens who have been convicted of a crime involving moral turpitude * * *. Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of title 18, [United States Code,] by reason of the punishment actually imposed * * * may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense * * *[.]

STATEMENT

Petitioner, a native and citizen of Canada, entered the United States on June 14, 1979, as a nonimmigrant visitor for pleasure with authorization to remain until June 17, 1979. On July 10, 1979, the Immigration and Naturalization Service served upon petitioner an order to show cause and notice of hearing charging that petitioner was subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), on the ground that he was excludable under the provisions of Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9), based on his conviction, prior to entry into the United States, of a crime involving moral turpitude (Pet. App. 23).

1. The undisputed evidence at petitioner's deportation hearing showed that, on August 11, 1970, petitioner was

convicted in the Provincial Court of Canada (Criminal Division) of having unlawfully and by a "false pretence" obtained $450 in Canadian currency from the Victoria and Grey Trust Co., Ltd. with intent to defraud, in violation of Section 304(1)(a) of the Criminal Code of Canada.[1] Petitioner's sentence was suspended in favor of a six-month term of probation (Pet. App. 24, 29).

At the deportation hearing, petitioner asserted, in essence, that he was not deportable as charged because the penalty actually imposed upon him by the Canadian court makes the crime for which he was convicted a "petty offense" when measured by United States standards (Pet. App. 29). The INS, on the other hand, contended that under applicable United States law, petitioner's crime could not be considered a misdemeanor and that it therefore could not be deemed a petty offense (*id.* at 30).

The immigration judge determined that there was no federal offense equivalent to petitioner's crime, but that the District of Columbia false pretenses statute, D.C.Code Ann. § 22-1301 (1973), was the appropriate equivalent

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[1]Section 304 of the Canadian Criminal Code (*reprinted in* J. Martin, A. Mewett & I. Cartwright, *Martin's Annual Criminal Code* 300 (1970)) provided in pertinent part (Pet. App. 4-5 n.5):

> (1) Everyone commits an offense who
>
> (a) by false pretence * * * obtains anything in respect of which the offense of theft may be committed or causes it to be delivered to another person * * *.

The punishment provision of the statute provided (Pet. App. 30):

> Everyone who commits an offense under paragraph (a) of subsection (1) is guilty of an indictable offence and is liable, to imprisonment for ten years * * * where the value of what is obtained exceeds $50.00 * * *.

As the court of appeals noted (Pet. App. 5 n.5), the statute was renumbered without substantive change in 1970.

United States offense.[2] Because both the Canadian offense of which petitioner was convicted and its United States equivalent were punishable by imprisonment for a term exceeding one year, the immigration judge concluded that petitioner's Canadian conviction was for an offense that would constitute a felony under United States law and that the petty offense exception of 8 U.S.C. 1182(a)(9) was accordingly inapplicable (Pet. App. 30-31).

The Board of Immigration Appeals upheld the immigration judge's finding of deportability (Pet. App. 22-26).

2. On petition for review, the court of appeals affirmed the Board's order of deportation (Pet. App. 1-19). The court agreed with petitioner's contention that the District of Columbia bad check statute, D.C. Code Ann. § 22-1410 (1973), is more closely analogous to petitioner's Canadian offense than the false pretenses offense defined by D.C. Code Ann. § 22-1301 (1973) (Pet. App. 3-10). In making this determination, the court first noted (*id.* at 2) that petitioner's offense apparently involved the passing of a check with the knowledge that there were insufficient funds to cover it. The court pointed out that Canada, unlike the District of Columbia, does not have a separate bad check statute and that "all bad check violators in Canada are prosecuted, if at all, under Section 304(1)(a)" (Pet. App. 9). Based on the circumstances of petitioner's offense, the court concluded that, if petitioner had committed that offense in the District of Columbia, "it is more likely that [petitioner] would have

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[2] 22 D.C. Code Ann. § 22-1301 (1973) provides in pertinent part:

> Whoever, by any false pretense, with intent to defraud, obtains from any person any service or anything of value * * * shall, if the value * * * or the sum or value of the money, property, or service so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years * * *.

been prosecuted under Section 1410 [the bad check statute], or would at least have had an opportunity to plead guilty thereunder" (Pet. App. 10).

The court of appeals then determined whether, as a matter of law, the provisions of Section 22-1410 should be applied as they existed at the time of petitioner's foreign conviction or at the time of his entry into the United States. Only in the former situation would petitioner be eligible for the limited exception of 8 U.S.C. 1182(a)(9), because shortly after petitioner's conviction, and almost nine years before his entry, Congress amended Section 22-1410 to provide for punishment as a felony.[3] The court held that

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[3]Petitioner was convicted in Canada on August 11, 1970. As of that date, D.C. Code Ann. § 22-1410 (1967) provided for misdemeanor-level punishment. The statute was amended on October 22, 1970, to provide for felony-level punishment.

In August 1970, D.C. Code Ann. § 22-1410 (1967) provided:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both.

Pursuant to an amendment enacted on October 22, 1970, D.C. Code Ann. § 22-1410 (1973) now provides:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, order, or other instrument for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation, shall, if the amount of such check, draft, order, or other instrument is $100 or more, be guilty of a felony and fined not more than $3,000 or imprisoned for not less than one year nor more than three years, or both[.] * * *

because an alien's excludability is determined as of the time of his entry into the United States, the proper approach is to examine the provisions of the analogous domestic statute as of the time of entry and not as of the time of conviction.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the deportation order on a ground not relied upon or presented at the administrative level, and that the rule adopted by the court is incorrect on its merits. It is our submission that petitioner was properly found deportable by both the immigration judge and the Board of Immigration Appeals, and that the decision below affirming the order of deportation does not warrant review by this Court.

1. The contentions raised in the petition rest on the assumption that the court of appeals was correct in rejecting the conclusions of the immigration judge and the BIA that the Canadian offense of which petitioner was convicted was more closely analogous to the District of Columbia bad check statute (D.C. Code Ann. § 22-1410 (1973)) than to the District of Columbia false pretenses statute (D.C. Code Ann. § 22-1301 (1973)). There is no need even to address petitioner's contentions, however, if petitioner's Canadian offense may properly be regarded as a felony under the reasoning adopted by the administrative body.

The Canadian statute under which petitioner was convicted provides for punishment exceeding one year's imprisonment. See note 1, *supra*. As the court of appeals acknowledged, petitioner's offense "would appear to be a felony under the statutory definitions set forth in 18 U.S.C.

§ 1(1) and (2)" (Pet. App. 5).[4] The court below properly noted (*ibid.*), however, that in order to provide consistency in the application of 8 U.S.C. 1182(a)(9), the BIA and the courts look to "the maximum penalty for an analogous statutory offense under the laws of the United States," *i.e.*, Title 18 of the United States Code, or, if no equivalent offense can be found therein, Title 22 of the District of Columbia Code. See *Giammario* v. *Hurney*, 311 F.2d 285, 286-287 (3d Cir. 1962); *Soetarto* v. *INS*, 516 F.2d 778, 780-781 (7th Cir. 1975); *Chiaramonte* v. *INS*, 626 F.2d 1093, 1097-1099 (2d Cir. 1980); *Knoetze* v. *United States Department of State*, 634 F.2d 207, 211 (5th Cir.), cert. denied, 454 U.S. 823 (1981); *In re Grazley*, 14 I. & N. Dec. 330 (1973); *In re Katzanis*, 14 I. & N. Dec. 266 (1973). See generally 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.43d, at 2-321 to 2-322 & n.76 (1977).

Here, the immigration judge and the BIA correctly concluded that petitioner's Canadian offense was analogous to the District of Columbia false pretenses statute. Indeed, the elements of D.C. Code Ann. § 22-1301 (1973) are virtually identical to those of Section 304(1)(a) of the Canadian Criminal Code. See notes 1 and 2, *supra*. As the court of appeals itself conceded (Pet. App. 7), "[b]oth sections codify the common law crime of false pretenses in their respective jurisdictions, and each requires proof of similar elements." The court nevertheless concluded (*id.* at 8-10) that, in the particular circumstances of this case, the District of

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[4] 18 U.S.C. 1 provides in pertinent part:

> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> • • • • •

Columbia bad check statute (D.C. Code Ann. § 22-1410 (1973)) — a lesser included offense of Section 22-1301 — was the more closely analogous domestic offense. The court reached this conclusion by entertaining the possibility that, if petitioner had committed the crime in the District of Columbia, he might have been charged with, or at least been given the opportunity of pleading guilty to, the lesser offense.

We submit that the court below erred in its analysis. It is not the province of the BIA or the courts to indulge in speculation or conjecture about whether a prosecuting officer in this country might have chosen, as a matter of discretion, to bring lesser charges against an alien who is otherwise excludable under 8 U.S.C. 1182(a)(9). Both administrative and judicial review in this context should be limited to the judicial record of conviction, and should not be based on an independent assessment of the underlying circumstances. See *Zinnanti* v. *INS*, 651 F.2d 420, 421 (5th Cir. 1981); *Chiaramonte* v. *INS, supra*, 626 F.2d at 1098. As the Second Circuit stated in an analogous context (*ibid.*, quoting *Pino* v. *Nicolls*, 215 F.2d 237, 245 (1st Cir. 1954), rev'd on other grounds, 349 U.S. 901 (1955)):

> If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity.

The approach adopted by the court of appeals, of requiring the immigration authorities to inquire into the circumstances underlying a foreign conviction and speculating about how a prosecutor in this country might have handled a similar situation, "could not, as a practical matter, assure

a forum reasonably adapted to ascertaining the truth of the claims raised. It could only improvidently complicate the administrative process." *Zinnanti* v. *INS, supra,* 651 F.2d at 421. This point is illustrated by this case, since the court of appeals itself acknowledged that "[t]he precise nature of [petitioner's] offense is not entirely clear, for neither the immigration judge nor the attorneys involved in the case questioned him about it at the deportation hearing" (Pet. App. 2 n.1). Accordingly, the court's understanding of the circumstances of petitioner's offense was based entirely on petitioner's description of them in his initial brief (*ibid.*).

In short, the court of appeals properly upheld the deportation order, but for the wrong reasons. Thus, it is not necessary for the court to consider the contentions raised in the petition.

2. Contrary to petitioner's contention (Pet. 8-11), the court of appeals reasonably applied a "relation-back" theory in construing D.C. Code Ann. § 22-1410 (1973) for purposes of determining petitioner's deportability under 8 U.S.C. 1251(a)(1) and 1182(a)(9). The court below correctly explained that petitioner's reliance on *Costello* v. *INS,* 376 U.S. 120 (1964), and *United States ex rel. Brancato* v. *Lehmann,* 239 F.2d 663 (6th Cir. 1956), was misplaced (Pet. App. 16):

> Notwithstanding this general reluctance to attach retrospective effect to the deportation laws, we believe that neither *Brancato* nor *Costello* are dispositive of the case at bar. Each of these cases interprets statutes which are not directly at issue here. More importantly, both decisions are premised on the utter lack of any authority in the texts or legislative histories regarding retroactivity. Here, however, by referring to "the law existing at the time of * * * entry," Congress expressly designed Section 1251(a)(1) to reflect changes in the laws of excludability. Although for reasons outline[d]

above, it did not do the same for changes in criminal statutes used to analogize to foreign convictions, such an interpretation is completely in keeping with the language and the purpose of the deportation statute. Unlike the courts in *Brancato* and *Costello*, therefore, we have explicit, albeit indirect, authority for using the relation-back concept in construing the statute before us. Accordingly, we believe these cases to be distinguishable.

No alien can claim a right to enter the United States. Congress has sovereign and plenary power to determine which aliens shall enter. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). Even after an alien is permitted to enter, he acquires no vested right to remain in this country and is subject to expulsion on grounds fixed by Congress. See *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). Because petitioner had no vested right to enter or remain in the United States, and because the court of appeals reasonably construed the Immigration Act in applying the standards reflected in D.C. Code Ann. § 22-1410 (1973) as of the time of petitioner's entry, petitioner's challenge to the decision below is without merit.

It is entirely appropriate to evaluate the seriousness of a particular offense for immigration purposes by the standards prevailing at the time of an alien's entry into the United States. No alien has a "right" to have his foreign conviction assessed by the standards existing in the United States on the date the foreign judgment of conviction was entered; there is no nexus between the alien and this country at that time. It makes far more sense to test the conviction for excludability purposes at the moment the alien enters the United States. Moreover, as the court below noted (Pet. App. 18 n.16), a "time of entry" rule is no more likely to

produce harsh or fortuitous results than the "time of conviction" rule urged by petitioner. Accordingly, the challenged order of deportation was properly affirmed.

3. In any event, petitioner has not demonstrated that the issues he presents are likely to arise with any frequency. First, the court of appeals decided that the lesser included domestic offense was more closely analogous to petitioner's foreign offense based on the "rather peculiar facts" of this case (Pet. App. 10). There is no reason to suppose that a substantial number of aliens convicted of crimes involving moral turpitude will be regarded as having been convicted of a misdemeanor under the analysis adopted by the court below. Moreover, petitioner's claims arise from the highly unusual fact that the allegedly equivalent United States offense was classified as a misdemeanor at the time of petitioner's foreign conviction but as a felony at the time of his entry into this country. We doubt that a significant number of aliens are, or are likely to be, in a position similar to that of petitioner.

Furthermore, unlike in *INS* v. *Wang*, 450 U.S. 139 (1981), on which petitioner relies (Pet. 6-7), the court of appeals in this case did not overrule the BIA's interpretation of the immigration laws. In fact, the court affirmed the BIA's finding that petitioner was deportable under 8 U.S.C. 1251(a)(1) and 1182(a)(9). It is true that the court decided a question of statutory intrepretation that had not been addressed by the BIA, but it did so only in response to petitioner's argument that the BIA had erred in not using D.C. Code Ann. § 22-1410 (1973) as the appropriate analog to petitioner's Canadian offense. The fact that the BIA had never before addressed the question whether the analogous offense must be viewed as of the time of conviction rather than as of the time of entry suggests that the issue is not a recurring one. And if the issue ever does arise, it is quite

conceivable that the BIA will agree with the interpretation of the court of appeals. If the BIA adopts a contrary interpretation, there will be time enough to resolve the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

THOMAS W. HUSSEY
ROBERT KENDALL, JR.
Attorneys

MARCH 1983

NO. 82-1219

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERBERT CLYDE SQUIRES
Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE
Respondent

REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Carlos M. Recio
SOLOMON, FOLEY & MORAN
Suite 560
1707 L Street, N.W.
Washington, D.C. 20036
(202) 775-1870

Attorney for Petitioner
Herbert Clyde Squires

TABLE OF AUTHORITIES

Chiaramonte v. INS, 626 F.2d 1093 (2d Cir. 1980) 5

Costello v. INS, 376 U.S. 120 (1963) 6

Matter of Bader, 17 I & N Dec. 525 (BIA 1980) 4

Matter of De La Nues, 18 I & N Dec.____ (BIA I.D. #2885 1981) 4, 7

Matter of Ghunaim, 15 I & N Dec. 269 (BIA 1975) 2

Matter of Granados, 16 I & N Dec. 726 (BIA 1979) 8

Matter of Katzanis, 14 I & N Dec. 266 (BIA 1973) 2

Matter of McNaughton, 16 I & N Dec. 569 (BIA 1978) .. 2

Matter of Mena, 17 I & N Dec. 38 (BIA 1979) 2

Matter of P-, 2 I & N Dec. 857 (BIA 1947) 4

Matter of T, 2 I & N Dec. 22 (A.G. 1944) 3, 5

U.S. Ex Rel Andreacchi, v. Curran, 38 F.2d 498 (S.D.N.Y. 1926) 8

Woodby v. INS, 385 U.S. 276 (1966) 3

Zinnanti v. INS, 651 F.2d 420 (5th Cir. 1981) 5

8 U.S.C. Section 1251(a)(1) 6

1979 Statistical Yearbook for Immigration and Naturalization Service 7

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case concerns an alien who has been ordered deported and forever barred from the United States on the basis of a twelve year old bad check conviction. On April 1, 1983, the government filed a brief in opposition to the petition for a writ of *certiorari*. In this reply brief, petitioner shows that the government opposition is flawed and that the petition for writ of *certiorari* should be granted.

ARGUMENT

1. The government does not deny that once the Court of Appeals disagreed with the reasoning of the administrative authorities, it should have remanded the case to the administrative authorities for determination of the novel "time of conviction" versus "time of entry" issue. The government, instead, argues that the Court of Appeals erred in going behind the petitioner's Canadian record of conviction for obtaining money under false pretenses to analyze the underlying facts — that petitioner wrote a check knowing that there were insufficient funds in his account.[1] The government thus disagrees with the *procedure* that the Court of Appeals used to determine the nature of petitioner's crime. The government does not dispute that if the record shows that petitioner Squires was

[1] This Court should be firmly aware that the government made this argument for the first time in opposition to *certiorari*. As the Court of Appeals noted, the government never disputed the fact that this was a bad check case. (Petition App. at 2, note 1) It is unreasonable for the government not to dispute an issue before the Court of Appeals and then argue to this Court that the Court of Appeals was wrong in proceeding on the basis of what it considered to be undisputed facts. This procedure is not fair to the petitioner or to the Court of Appeals.

indeed convicted of a bad check charge, then the Court of Appeals was correct to analogize his offense to the D.C. bad check statute.

a. The sole evidence introduced against the petitioner at the deportation hearing was a one-page record of conviction. This stated only that the petitioner was convicted of taking $450 by false pretenses from a Canadian bank. The Immigration and Naturalization Service introduced no other portions of the record explaining petitioner's crime. In Canada, as the Court of Appeals noted, all bad check cases are prosecuted under the false pretenses statute. (Pet. App. 9) Thus, the record is entirely consistent with petitioner's claim that his offense was writing a check knowing that there were insufficient funds in his account.

The government's argument is distressing because the bare state of the record is the government's doing. At the deportation hearing, the INS introduced only a sparse portion of the record of petitioner's conviction. No indictment, transcript of testimony or judicial opinion was introduced. Ordinarily, the Board of Immigration Appeals examines a *complete* conviction record, including the charge or indictment, the plea, the judgment or verdict, and the sentence in determining whether a crime is one involving moral turpitude or whether a crime is merely a petty offense. *Matter of Mena*, 17 I & N Dec. 38, 39 (BIA 1979) ("the record of (an alien's) conviction has generally been held to consist of the charge, the indictment, the plea, the verdict, and the sentence"). *See Matter of McNaughton*, 16 I & N Dec. 569 (BIA 1978) (examining opinions of Canadian trial and appellate judges to determine moral turpitude of alien's conviction); *Matter of Ghunaim*, 15 I & N Dec. 269, 270 (BIA 1975) (examining petitioner's indictment); *Matter of Katzanis*, 14 I & N Dec. 266 (BIA 1973) (examining translated transcript of

findings of the Greek Court in determining facts and circumstances of convictions for purposes of moral turpitude and petty offense determinations).

In this case, the government introduced only a small part of the conviction record. The record is incomplete. If the government now contends that the record is inadequate to show that this case did involve a minor check bouncing incident — something that was uncontested below — then the petitioner should at least be allowed to supplement the record and prove that this is indeed what occurred.

The government has the burden of proving deportability by clear, convincing and unequivocal evidence, *Woodby v. INS*, 385 U.S. 276 (1966). At a minimum, petitioner should be afforded the opportunity of supplementing the conviction record with copies of his indictment in Canada, a transcript of the sentencing hearing, etc. to show that he was indeed convicted of a petty offense. Thus, the government's newly articulated position in its brief in opposition to *certiorari* warrants a granting of the writ and a remanding of this case to the administrative authorities for further proceedings.

b. In any event, the premise of the government's argument is incorrect. It is not and has never been the law that administrative review of a foreign conviction is "limited to the judicial record of conviction," as the government argues (Resp. Br. in Opp. at p. 8). The administrative authorities have never limited themselves to the foreign record of conviction in judging whether an alien's crime is one of moral turpitude or a petty offense.

The attorney general clearly outlined this in *Matter of T-*, 2 I & N Dec. 22, 42 (A.G. 1944). There, the attorney general considered the case of a Canadian citizen who had been convicted of theft in Canada. The Canadian theft statute in-

cluded offenses which would not be so characterized under U.S. law. That is, the Canadian theft statute included the taking of property with intent to steal, (a crime involving moral turpitude) as well as a simple unlawful taking (which would not be a crime involving moral turpitude). The attorney general stated that the Board of Immigration Appeals had the obligation to examine all of the circumstances in determining exactly what the alien was convicted of:

> In any event I believe that the majority of the Board erred in concluding that the Board was precluded from exercising its independent judgment as to whether the crime for which the appellant was convicted involved moral turpitude and that it was required to decide this issue by a mechanical application of the definitions found in the Canadian statutes. I think the correct rule is that the Board is entitled to look beyond the statutes, to consider such facts as may appear from the record of conviction *or the admissions of the alien* and to reach an independent conclusion as to whether the offense is one which under our law involves moral turpitude. *Id.* at 42 (emphasis added)

The Board applied this decision in *Matter of P-*, 2 I & N Dec. 857 (BIA 1947). There, a Canadian citizen was convicted of theft in Canada. The Board found that the alien was not excludable for having committed a crime involving moral turpitude because the alien's *testimony* showed that he had only temporarily taken the property in question and did not intend to permanently deprive the victim of it. *See also Matter of Bader*, 17 I & N Dec. 525, 526-27 (BIA 1980) (upholding deportability on the basis of the alien's admissions and an uncertified copy of a foreign conviction.)

A recent example of the Board's using its discretion to examine relevant facts and circumstances is *Matter of De La Nues*, 18 I & N Dec. _____ (BIA I.D. #2885 1981), one of

the Cuban boatlift cases. There, the Board found the alien excludable based on the alien's admissions regarding his Cuban convictions. The Board did not even bother to examine Cuban law. It took the alien's admissions and compared the offenses he described with those defined in the District of Columbia Code.

The case at bar is similar to *Matter of T-, supra.* The Canadian false pretenses statute in issue here encompasses conduct which may be deemed to be a felony or a misdemeanor depending upon how one applies the "time of conviction" versus "time of entry" doctrine addressed by the Court of Appeals. Given these circumstances, the Court of Appeals did nothing unusual in going behind the bare record of conviction and accepting petitioner's claim that he was guilty only of bouncing a check.[2] This is particularly true because, as noted above, the government introduced only a small, incomplete part of the record and because the

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[2] The cases relied upon by the government are not to the contrary. In *Zinnanti v. Immigration and Naturalization Service,* 651 F.2d 420 (5th Cir. 1981), the Court considered the case of an alien who pleaded guilty to possession of an unregistered sawed-off shotgun. Such a conviction makes one specifically deportable under 8 U.S.C. Section 1251(a)(14). The Fifth Circuit merely held that this the alien could not collaterally attack his guilty plea in deportation proceedings. In that case, the alien attempted to argue to the court that his guilty plea was not voluntary. Similarly, in *Chiaramonte v. INS,* 626 F.2d 1093 (2d Cir. 1980), the Court of Appeals discussed convictions for theft in Italy. In that case, the official records showed that the alien that committed the crime of theft. The Court of Appeals did not permit the alien to explain away his moral culpability. The Court noted that the elements of the crime charged under the Italian Penal Code and larceny as understood in American law were the same. 626 F.2d at 1099. In each of these cases, the aliens tried to challenge the record of their offenses. In the case at bar, petitioner's explanation that he had been found guilty of bouncing a check was not contrary to the record, it was entirely consistent with the record.

government never contested petitioner's description of his Canadian offense.

2. The government briefly defends the Court of Appeals' opinion on the merits. The government claims that the Court of Appeals "reasonably applied a relation back theory" in upholding petitioner's deportability on novel grounds. The government also claims that no alien has the "right" to have his excludability assessed at the time of his conviction as opposed to at the time of his entry into the United States.

The government has missed the point. The Court of Appeals openly stated that its construction of the Immigration and Nationality Act was "harsh" and "anomalous". The Court of Appeals thought that its decision was compelled by the statute it was construing, 8 U.S.C. Section 1251(a)(1). The Court of Appeals was wrong. Congressional intent was to not allow grounds of excludability to relate back. *See* pet. at 9-10; *Costello v. INS*, 376 U.S. 120 (1963).

More important, the government fails to address the real issue in the petition for a writ of certioriari. That is, that the time of entry "relation back" theory applied by the Court of Appeals should never have been addressed. The Court of Appeals should have remanded the case to the administrative authorities so that they could exercise their discretion in reasonably construing the statute. This is particularly true because there are alternative constructions of the Act which do not produce the harsh and anomalous results which stem from the Court of Appeals' opinion. For example, the Board of Immigration Appeals could easily rule that an alien in petitioner's position should be given the benefit of U.S. law existing at *either* the time he was convicted or at the time that the alien entered the United States. Such a construction is plainly within the

Board of Immigration Appeals' power and would be consistent with the well-established rule that Immigration statutes must be strictly construed in favor of the alien.

3. The government's final argument is that the petitioner has not demonstrated that the issues presented are likely to arise with any frequency.

The principal issue presented in the petition for a writ of certiorari is a recurring one. It is an issue which the government commonly complains about — that is, a Court of Appeals not paying deference to the Board of Immigration Appeals. In this case, the Court of Appeals violated the well-established rule that the decision of an administrative body should be affirmed only on the grounds advanced by the administrative body.

Moreover, the novel "time of entry" versus "time of conviction" issue that the Court of Appeals reached out to decide does have significant precedential effect. The Court of Appeals' decision affects virtually all cases concerning an alien convicted of a foreign offense: cases involving determinations of deportability for crimes involving moral turpitude; cases involving the petty offense exception; cases involving the juvenile offense exception to deportability. *See Matter of De La Nues, supra.*

There are untold millions of aliens, legal and illegal, in the United States. In 1979, a total of 5, 058,400 aliens reported under the alien address program. (1979 Statistical Yearbook of the Immigration and Naturalization Service, table 34, page 81.) 966,137 aliens were required to depart the United States in 1979. *Id.* at p. 67. An additional 25,888 aliens were formally deported from the United States in 1979. *Id.* There were 55,886 deportation hearings held in 1979. *Id.* at p. 62. Yet, judicial review of orders of deportation is rare. A total of 259 cases were disposed of in 1979. *Id.* at p. 109.

These statistics reveal the flaw in the government's argument. Very few immigration cases are appealed. There are few reported decisions. Judicial precedent is of extreme significance. Further, *any* alien convicted of a bad check charge abroad is directly affected by this case. Under the Court of Appeals' decision, that alien's deportability depends on the accident of when the alien entered the United States. Bad check charges are neither infrequent nor uncommon.[3]

[3] A good analogy establishing the powerful effect of the decision below, if left undisturbed, is the issue whether possession of a concealed weapon is a crime involving moral turpitude. It has been held that such a crime is not one involving moral turpitude. Yet, the latest precedent on this issue is over 57 years old. *U.S. Ex. Rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D. N.Y. 1926). This 57 year old district court opinion has set the precedent on this issue and has been followed in countless cases that have not been judicially or administratively reported. *See Matter of Granados*, 16 I & N Dec. 726, 728 (BIA 1979) (dictum citing *Andreacchi* for the proposition that conviction for possession of a concealed sawed off shotgun is not a crime involving moral turpitude).

CONCLUSION

For the reasons outlined above, as well as those outlined in the petition for a writ of *certiorari*, petitioner respectfully requests that the writ be granted and that the case be remanded to the Board of Immigration Appeals for supplementation of the record and a decision on the merits. A remand is especially in order in light of the government's present position that the record did not justify the Court of Appeals' treating this as a bad check case. This case is thus appropriate for summary disposition by this Court.

Respectfully submitted,

Carlos M. Recio
SOLOMON, FOLEY & MORAN
Suite 560
1707 L Street, N.W.
Washington, D.C. 20036
(202) 775-1870

Counsel for Petitioner